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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 CARLOS VICTORINO and ADAM
12 TAVITIAN, individually, and on behalf of
13 other members of the general public
14 similarly situated,

14 Plaintiffs,

15 v.

16 FCA US LLC, a Delaware limited
17 liability company,

18 Defendant.

Case No.: 16cv1617-GPC(JLB)

**ORDER DENYING PLAINTIFFS'
AMENDED MOTION FOR CLASS
CERTIFICATION**

[Dkt. No. 215.]

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20 Before the Court is Plaintiffs' amended motion for class certification filed on April
21 6, 2018. (Dkt. No. 215.) Defendant filed an opposition on April 27, 2018. (Dkt. No.
22 229.) On May 1, 2018, the Court granted Defendant's ex parte motion for leave to
23 amend its opposition by interlineation. (Dkt. Nos. 234, 236.) Plaintiffs filed their reply
24 on May 11, 2018. (Dkt. No. 244.) With leave of Court, Defendant filed a sur-reply on
25 May 21, 2018. (Dkt. No. 252.) Plaintiffs filed a sur-sur-reply on May 23, 2018. (Dkt.
26 No. 254.) A hearing was held on June 1, 2018. (Dkt. No. 256.) After a careful review of
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the briefs, supporting documentation, the applicable law, and hearing oral argument, the Court DENIES Plaintiffs' amended motion for class certification.

Background

Plaintiffs Carlos Victorino ("Victorino") and Adam Tavitian ("Tavitian") (collectively "Plaintiffs") filed a putative first amended class action complaint based on defects in the 2013-2016 Dodge Dart vehicles equipped with a Fiat C635 manual transmission that cause their vehicles' clutches to fail and stick to the floor against Defendant FCA US LLC ("FCA" or "Defendant"), the manufacturer of these vehicles, including Plaintiffs' vehicles. (Dkt. No. 104, FAC ¶¶ 1, 2, 52.) In their amended motion for class certification, Plaintiffs claim a design defect in the 2013-2015 Dodge Dart vehicles equipped with a Fiat C635 manual transmission built on or before November 12, 2014 ("Class Vehicles"). (Dkt. No. 215-1 at 6¹.)

Plaintiffs claim the hydraulic clutch system ("Clutch System") is defective where the "clutch pedal loses pressure, sticks to the floor, and fails to engage/disengage gears. As a result, the Class Vehicles exhibit stalling, failure to accelerate, and premature failure of the Clutch System's components, including the clutch master cylinder and reservoir hose, clutch slave cylinder and release bearing, clutch disc, pressure plate, and flywheel." (Dkt. No. 104, FAC ¶ 2.)

Plaintiffs allege two separate defects in the Clutch System.² First, the clutch defect is caused by the degradation of the clutch reservoir hose, which releases plasticizer and

¹ Page numbers are based on the CM/ECF pagination.

² While the parties dispute whether Plaintiffs have abandoned the theory of the second defect alleged in the clutch slave cylinder, the Court concludes that for the breach of implied warranty claims, the two defects alleged in the FAC that make the Class Vehicles unmerchantable remain. Because of the Court's ruling on summary judgment concerning the CLRA and related causes of action granting judgment against Victorino but not Tavitian and granting summary judgment as to the alleged defective construction of the CSC due to FCA's lack of pre-sale knowledge solely on the CLRA and related

1 fibers, causing contamination of the hydraulic fluid that bathes the components of the
2 Clutch System. (Id. ¶ 7.) As a result, the contamination causes the internal and external
3 seals of the clutch master cylinder (“CMC”) and clutch slave cylinder (“CSC”) to swell
4 and fail. (Id. ¶¶ 7, 8.) According to Plaintiffs, when fluid in the hydraulic system
5 becomes contaminated, all of the components that have been exposed to the contaminated
6 fluid must be replaced and any steel tubing must also be thoroughly cleaned with brake
7 cleaner and blown out until dry to ensure that none of the contaminants remain. (Id. ¶ 8.)
8 Second, Plaintiffs claim an additional defect in the CSC which exacerbates the problems
9 with the Clutch System. FCA designed its CSC as an assembly composed of an
10 aluminum body with a clipped-on plastic base whereas other manufacturers’ slave
11 cylinders are composed of a single, solid cast aluminum component which creates a rigid
12 base. (Id. ¶ 13.) Defendant’s two-piece design destabilizes the cylinder at its base,
13 “which can result in unintended lateral movement and cause the piston inside the cylinder
14 to become jammed.” (Id.)

15 On January 8, 2016, FCA implemented a voluntary customer service action,
16 Service Bulletin 06-001-16 entitled “Clutch Pedal Operation X62 Extended Warranty”
17 (“X62 Extended Warranty repair”) to address the issue of the contaminated hydraulic
18 fluid caused by the degradation of the clutch reservoir hose and involved the
19 “replacement of the hydraulic clutch master cylinder and reservoir hose” for the 2013-
20 2015 Dodge Dart vehicles. (Dkt. No. 216-1, Zohdy Decl., Ex. H at 62; Dkt. No. 183-4,
21 Padgett Decl., Ex. 9 at 19.)

22 In this litigation, Plaintiffs claim that the X62 Extended Warranty repair failed to
23 fully address and repair the defect and ignores the systemic effect of the contaminated
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26 causes of action, the Court recognizes that there may have been some confusion as to the defects that
27 support the remaining breach of implied warranty claims.

1 hydraulic fluid. They contend that if the hydraulic fluid is contaminated, all clutch
2 system components are susceptible to damage and the well-known industry standard
3 requires that all component parts within the system must be replaced. (Dkt. No. 216-1,
4 Zohdy Decl., Ex. B, Stapleton Decl. ¶ 9.) According to Plaintiffs, any repair requires
5 replacement of all component parts, including the CSC, thorough cleaning of any steel
6 tubing with brake cleaner and drying before reassembly. (Dkt. No. 232-5, D's Mot. to
7 Exclude, Stapleford Expert Report ¶ 16.)

8 Defendant denies that the alleged defects exist. The defense points out that the seal
9 swelling condition could affect only 16% of the Class Vehicles because each Class
10 Vehicle has component parts that are manufactured differently. (Dkt. No. 229-1, Benson
11 Decl. ¶¶ 18, 19.) The differences are attributable to the manufacture of reservoir hoses
12 with different amounts of plasticizer, the manufacture of CMCs in different sizes, and
13 variations in the positioning of primary seals on the CMC. (*Id.*) According to the
14 defense, the existence of the defect depends entirely on the amount of plasticizer in the
15 reservoir hose, the size and position of the clutch system seals and the level of the
16 varying tolerances. (*Id.*)

17 The FAC alleged five causes of action for violations of California's Consumer
18 Legal Remedies Act ("CLRA"), California's unfair competition law ("UCL"), breach of
19 implied warranty pursuant to Song-Beverly Consumer Warranty Act ("Song-Beverly
20 Act"), breach of implied warranty pursuant to the Magnuson-Moss Warranty Act
21 ("MMWA"), and unjust enrichment. (Dkt. No. 104, FAC.) After the Court's ruling on
22 Defendant's motion for summary judgment and subsequent motion for reconsideration,
23 (Dkt. Nos. 206, 240), the remaining causes of action are the breach of implied warranty
24 of merchantability under the Song-Beverly Act, the MMWA, and a UCL claim premised
25 on the breach of implied warranty claims.

1 Because the Court's ruling on reconsideration was filed after the motion for class
2 certification and opposition were filed and discusses the CLRA and related claims, the
3 Court only addresses the issues as it relates to the remaining state and federal claims for a
4 breach of implied warranty of merchantability as well as the UCL claim. Furthermore,
5 after the hearing on class certification, on June 4, 2018, the parties filed a notice of a
6 potential settlement with Plaintiff Tavitian.³ (Dkt. Nos. 259, 260.) Accordingly, the
7 Court DENIES Plaintiff Tavitian's motion for class certification as moot and solely
8 addresses class certification as it relates to Plaintiff Victorino.

9 Discussion

10 A. Legal Standard on Class Certification

11 "The class action is an exception to the usual rule that litigation is conducted by
12 and on behalf of individual named parties only. In order to justify a departure from that
13 rule, a class representative must be a part of the class and possess the same interest and
14 suffer the same injury as the class members." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct.
15 2541, 2550 (2011) (internal quotation marks and citations omitted). A plaintiff seeking
16 class certification must affirmatively show the class meets the requirements of Rule 23.
17 Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (citing Dukes, 131 S. Ct. at
18 2551-52). To obtain certification, a plaintiff bears the burden of proving that the class
19 meets all four requirements of Rule 23(a)--numerosity, commonality, typicality, and
20 adequacy. Ellis v. Costco Wholesale Corp., 657 F.3d 970 979-80 (9th Cir. 2011). If
21 these prerequisites are met, the court must then decide whether the class action is
22 maintainable under Rule 23(b). United Steel, Paper & Forestry, Rubber, Mfg. Energy,
23 Allied Indus. & Serv. Workers Int'l Union AFL-CIO, CLC v. ConocoPhillips Co., 593

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27 ³ Based on the notice of potential settlement as to Tavitian's claims, on June 5, 2018, the Magistrate
28 Judge set a settlement disposition conference on June 22, 2018. (Dkt. No. 261.)

1 F.3d 802, 806 (9th Cir. 2010). This case involves Rule 23(b)(3), which authorizes
2 certification when “questions of law or fact common to class members predominate over
3 any questions affecting only individual class members,” and “a class action is superior to
4 other available methods for fairly and efficiently adjudicating the controversy.” Fed. R.
5 Civ. P. 23(b)(3). It also involves Rule 23(b)(2), which permits certification when “the
6 party opposing the class has acted or refused to act on grounds that apply generally to the
7 class, so that final injunctive relief or corresponding declaratory relief is appropriate
8 respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). The Court exercises discretion
9 in granting or denying a motion for class certification. Staton v. Boeing Co., 327 F.3d
10 938, 953 (9th Cir. 2003).

11 The Court is required to perform a “rigorous analysis,” which may require it “to
12 probe behind the pleadings before coming to rest on the certification question.” Dukes,
13 131 S. Ct. at 2551. “[T]he merits of the class members’ substantive claims are often
14 highly relevant when determining whether to certify a class. More importantly, it is not
15 correct to say a district court may consider the merits to the extent that they overlap with
16 class certification issues; rather, a district court must consider the merits if they overlap
17 with Rule 23(a) requirements.” Ellis, 657 F.3d at 981. Nonetheless, the district court
18 does not conduct a mini-trial to determine if the class “could actually prevail on the
19 merits of their claims.” Id. at 983 n.8; United Steel, Paper & Forestry, Rubber,
20 Manufacturing Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC, 593
21 F.3d at 808 (citation omitted) (court may inquire into substance of case to apply the Rule
22 23 factors, however, “[t]he court may not go so far . . . as to judge the validity of these
23 claims.”).

24 Here, the FAC alleges that the “implied warranty included, among other things: (i)
25 a warranty that the Class Vehicles and their Clutch Systems were manufactured, supplied,
26 distributed, and/or sold by FCA were safe and reliable for providing transportation; and
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1 (ii) a warranty that the Class Vehicles and their Clutch Systems would be fit for their
2 intended use while the Class Vehicles were being operated.” (Dkt. No. 104, FAC ¶¶ 131,
3 141.)

4 The Song-Beverly Consumer Warranty Act (“Song-Beverly Act”) provides that
5 “every sale of consumer goods that are sold at retail in this state shall be accompanied by
6 the manufacturer’s and the retail seller’s implied warranty that the goods are
7 merchantable.” Cal. Civ. Code § 1792. “Consumer goods” is defined as “any new
8 product or part thereof that is used, bought, or leased for use primarily for personal,
9 family, or household purposes, except for clothing and consumables.” Cal. Civ. Code §
10 1791(a). An implied warranty of merchantability under the Song-Beverly Act requires
11 that consumer goods “[a]re fit for the ordinary purposes for which such goods are used.”
12 Cal. Civ. Code § 1791.1(a).

13 The Song-Beverly Act provides for a minimum level of quality. Keegan v.
14 American Honda Motor Co., Inc., 838 F. Supp. 2d 929, 945 (C.D. Cal. 2012); American
15 Suzuki Motor Corp. v. Superior Ct., 37 Cal. App. 4th 1291, 1295-96 (1995) (“Unlike
16 express warranties, which are basically contractual in nature, the implied warranty of
17 merchantability arises by operation of law [I]t provides for a minimum level of
18 quality.”). For a vehicle, the question is whether the vehicle is fit for driving. Keegan,
19 838 F. Supp. 2d at 945. California courts “reject the notion that merely because a vehicle
20 provides transportation from point A to point B, it necessarily does not violate the
21 implied warranty of merchantability. A vehicle that smells, lurches, clanks, and emits
22 smoke over an extended period of time is not fit for its intended purpose.” Isip v.
23 Mercedes-Benz USA, LLC, 155 Cal. App. 4th 19, 27 (2007). “The core test of
24 merchantability is fitness for the ordinary purpose for which such goods are used.” Id. at
25 26. “Such fitness is shown if the product is ‘in safe condition and substantially free of
26 defects’” Mexia v. Rinker Boat Co., Inc., 174 Cal. App. 4th 1297, 1303 (2009)

1 (quoting Isip, 155 Cal. App. 4th at 27). It does not require that a vehicle be inoperable.
2 Avedisian v. Mercedes-Benz USA, LLC, 43 F. Supp. 3d 1071, 1079 (C.D. Cal. 2014).

3 In California, a current manifestation of malfunction is not an element of a breach
4 of implied warranty claim. Hicks v. Kaufman and Broad Home Corp., 89 Cal. App. 4th
5 908, 918, 923 (2011); see Wolin v. Jaguar Land Rover N. America, LLC, 617 F.3d 1168,
6 1173 (9th Cir. 2010) (“proof of the manifestation of a defect is not a prerequisite to class
7 certification.”). If there is no current malfunction, the plaintiff need only demonstrate
8 that the product “contains an inherent defect which is substantially certain to result in
9 malfunction during the useful life of the product.” Hicks, 89 Cal. App. 4th at 918.

10 The Magnuson-Moss Warranty Act (“MMWA”) provides that “a consumer who is
11 damaged by the failure of a supplier, warrantor, or service contractor to comply with any
12 obligation under this chapter, or under a written warranty, implied warranty, or service
13 contract, may bring suit for damages and other legal and equitable relief” 15 U.S.C.
14 § 2310(d)(1). Where a plaintiff alleges “a violation of the [Magnuson–Moss] Act only
15 insofar as [the defendant] may have breached its warranties under state law,” and where
16 there is “no allegation that [the defendant] otherwise failed to comply with the
17 Magnuson–Moss Act,” the plaintiffs’ “federal claims hinge on the state law warranty
18 claims.” Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 n.3 (9th Cir. 2008)
19 (claims under the MMWA “stand or fall with . . . express and implied warranty claims
20 under state law.”). In the Court’s order on summary judgment, it noted that the
21 allegations for breach of the implied warranty were similar under state and federal law
22 and therefore concluded that the state and federal breach of implied warranty claims rise
23 or fall together. (Dkt. No. 206 at 23-24.) Moreover, in their motion for class
24 certification, Plaintiff asserts that his MMWA implied warranty claims derive from
25 violations of the Song-Beverly Act. (Dkt. No. 215-1 at 8.) Therefore, the MMWA
26 stands or falls with the Song-Beverly Act. See Clemens, 534 F.3d at 1022 n. 3.

Here, Plaintiff seeks to certify the following:

Nationwide Implied Warranty Class to include,

All persons in the United States or its territories who purchased or leased, from an authorized dealership, a Dart Vehicle.

California Implied Warranty Class to include,

All persons who purchased or leased in California, from an authorized dealership, a Dart Vehicle.

Injunctive Relief Class to include,

All persons in California who purchased or leased, from an authorized dealership, a Dart Vehicle.

(Dkt. No. 215-1 at 8.)⁴ In reply, in response to Defendant’s argument that the Song-Beverly Act does not apply to used consumer goods, it appeared that Plaintiff adjusted the class definition of the California Implied Warranty Class to include “those subsequent purchasers whose vehicles were sold by FCA-authorized dealers and are typically warranted by FCA, and who, according to FCA would also receive notice of and coverage under the written X62 warranty extension.” (Dkt. No. 244 at 18.) However, in his sur-sur-reply, he contends that the statement was merely to explain the logic behind the definition and did not alter the definition. (Dkt. No. 254 at 8.)

B. Federal Rule of Civil Procedure 23(a)

1. Numerosity and Commonality

Plaintiff argues that the class is sufficiently numerous to satisfy Rule 23(a) and that the breach of implied warranty involves a common question. Defendant does not

⁴ Plaintiff also sought to include an Omissions Class to include, “All persons in California who are ‘consumers’ within the meaning of California Civil Code § 1761(d) (the ‘CLRA’) and purchased or leased, after October 1, 2013, from an authorized dealership, a Dart Vehicle”; however, the Court granted summary judgment on the CLRA claim in the Court’s prior orders. (See Dkt. Nos. 206, 240.) Therefore, Plaintiff’s certification of the omissions class is moot.

1 challenge Plaintiff’s argument that the putative class is sufficiently numerous or that
2 issues of law or fact are common to the class under Rule 23(a).

3 To establish numerosity, a plaintiff must show that the represented class is “so
4 numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1); Bates
5 v. United Parcel Serv., 204 F.R.D. 440, 444 (N.D. Cal. 2001). A court may reasonably
6 infer based on the facts of each particular case to determine if numerosity is satisfied.
7 Ikonen v. Hartz Mtn. Corp., 122 F.R.D. 258, 262 (S.D. Cal. 1988).

8 Plaintiff states that over 2000 class vehicles were sold in California. (Dkt. No.
9 239-3, Zohdy Decl., Ex. EE at 119 (UNDER SEAL).) Based on these numbers, the
10 Court concludes that the numerosity element has been met. See Ikonen, 122 F.R.D. at
11 262 (“As a general rule, classes of 20 are too small, classes of 20–40 may or may not be
12 big enough depending on the circumstances of each case, and classes of 40 or more are
13 numerous enough.”).

14 As to commonality, Rule 23(a)(2) requires Plaintiff to show “there are questions of
15 law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Commonality requires the
16 plaintiff to demonstrate that the class members ‘have suffered the same injury.’” Dukes,
17 131 S. Ct. at 2551. “That common contention . . . must be of such a nature that it is
18 capable of classwide resolution – which means that determination of its truth or falsity
19 will resolve an issue that is central to the validity of each one of the claims in one stroke.”
20 Id. ““What matters to class certification . . . is not the raising of common ‘questions’ . . .
21 but, rather the capacity of a classwide proceeding to generate common answers apt to
22 drive the resolution of the litigation. Dissimilarities within the proposed class are what
23 have the potential to impede the generation of common answers.” Id. (emphasis in
24 original) (citation omitted). “[C]ommonality only requires a single significant question
25 of law or fact.” Mazza v. American Honda Motor Co., Inc., 666 F.3d 581, 589 (9th Cir.
26 2012) (commonality not disputed as to whether Honda “had a duty to disclose or whether
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1 the allegedly omitted facts were material and misleading to the public”); Rodriguez v.
2 Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010) (Commonality is satisfied “if the named
3 plaintiffs share at least one question of fact or law with the grievances of the prospective
4 class.”) (quoting Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)).

5 Plaintiff asserts that the common issue on the breach of implied warranty is
6 whether the vehicles are “merchantable.” He claims that there is a common design defect
7 of the Clutch System inherent in every Class Vehicle rendering them unsafe. Defendants
8 do not dispute Plaintiff’s common issue of law and fact under Rule 23(a)(2). The Court
9 concludes that this common question applies to the entire class and satisfies the less
10 rigorous commonality requirement. See In re Hyundai and Kia Fuel Economy Litig., 881
11 F.3d 679, 691 (9th Cir. 2013) (“The Rule 23(b)(3) predominance inquiry is ‘far more
12 demanding’ than Rule 23(a)’s commonality requirement.”); Hanlon v. Chrysler Corp.,
13 150 F.3d 1011, 1019 (9th Cir. 1998) (recognizing that commonality under Rule 23(a)(2)
14 to be “less rigorous” than the predominance companion requirement under Rule
15 23(b)(3)); Mazza, 666 F.3d at 589 (referring to Rule 23(a)(2) commonality requirement
16 as a “limited burden”).

17 **2. Typicality⁵**

18 Under typicality, the Court must determine whether the claims or defenses of the
19 representative parties are typical of the claims or defenses of the class. Fed. R. Civ. P.
20 23(a)(3). “The purpose of the typicality requirement is to assure that the interest of the
21 named representative aligns with the interests of the class.” Hanon v. Dataproducts
22 Corp., 976 F.2d 497, 508 (9th Cir. 1992) (internal citation omitted). “The test of
23 typicality is whether other members have the same or similar injury, whether the action is
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27 ⁵ Defendant confusingly conflates the arguments on typicality and adequacy. Typicality and adequacy
28 require different analyses and the Court has attempted to separate out its arguments accordingly.

1 based on conduct which is not unique to the named plaintiffs, and whether other class
2 members have been injured by the same course of conduct.” Id. “Under the rule’s
3 permissive standards, representative claims are ‘typical’ if they are reasonably co-
4 extensive with those of absent class members; they need not be substantially identical.”
5 Hanlon, 150 F.3d at 1020.

6 Plaintiff argues that his claims concern the purchase or lease of the Class Vehicle
7 equipped with a defectively designed clutch system at the time of purchase. Plaintiff’s
8 common injury is the overpayment of his Class Vehicle when he purchased it. Defendant
9 argues that Victorino was not injured by an incomplete X62 Extended Warranty repair
10 because his vehicle never had or even needed the repair, and therefore, he has not
11 suffered the same injury as or sustained the same type of damage as putative class
12 members. Plaintiff does not address this issue in their reply.

13 In moving for class certification, and as discussed in detail below, Plaintiff does
14 not need to demonstrate a manifestation of a current defect on a breach of an implied
15 warranty claim. See Wolin, 617 F.3d at 1173. Therefore, the fact that Victorino’s CMC
16 and reservoir hose has not yet manifested a defect, as the Court concluded in its order on
17 Defendant’s motion for reconsideration on the CLRA claim, (Dkt. No. 240 at 7-8), is not
18 a requirement in demonstrating whether a class should be certified for breach of implied
19 warranty. Victorino as well as the proposed class members allege their Clutch Systems
20 were defective when they purchased their vehicles and seek damages for breach of the
21 implied warranty. See Wolin, 617 F.3d at 1175 (typicality met because the plaintiffs
22 allege common defect and legal theories as the class members and can be met “despite
23 different factual circumstances surrounding the manifestation of the defect.”).
24 Representative claims need only be “reasonably co-extensive with those of absent class
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members; they need not be substantially identical”, Hanlon, 150 F.3d at 1020, and in this case, Plaintiff has demonstrated that typicality has been met.⁶

3. Adequacy

As to adequacy, Rule 23(a)(4) provides that class representatives must “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). In analyzing whether Rule 23(a)(4) has been met, the Court must ask two questions: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015, 1031 (9th Cir. 2012) (quoting Hanlon, 150 F.3d at 1020). “Several courts have held that ‘class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation.’” Hanon, 976 F.2d at 508. A motion for class certification should not be granted if “there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.” Id. (citation omitted). “Defendants need not show that these unique defenses will necessarily succeed, but rather that they will shape the focus of litigation in a way that may harm class members and ultimately risk the class’ chance of recovery.” Schaefer v. Overland Express Family of Funds, 169 F.R.D. 124, 129 (S.D. Cal. 1996).

Plaintiff summarily asserts that his interests do not conflict with the interests of the Class and is seeking the same remedies as the class based on the same core of operative facts, and that his counsel is more than adequate to represent the class. Defendant opposes arguing that Plaintiff and Plaintiff’s counsel are inadequate.

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⁶ In the typicality analysis, FCA contends that Plaintiff is not typical of those class members who purchased used vehicles. The Court addresses the “used vehicle” issue on the predominance factor.

1 **a. Adequacy of Counsel**

2 Plaintiff generally claims that he has retained highly qualified and competent
3 counsel with significant experience litigating class actions. (Dkt. No. 216-1, Zohdy
4 Decl., 41, Ex. MM.) He notes that during this litigation he has defeated FCA's motion
5 for leave to file a third party complaint, (Dkt. No. 133), reconsideration on a motion to
6 compel, (Dkt. No. 136), and obtained a partial denial of summary judgment, (Dkt. No.
7 206).

8 In opposition, Defendant argues that proposed class counsel is not adequate to
9 represent the class as actions during the litigation raise questions as to their integrity and
10 trustworthiness. First, the Court, in a prior order, concluded that class counsel violated
11 California Rule of Professional Conduct 3-510 for failing to communicate settlement
12 offers to their clients. (Dkt. No. 115 at 8.) Moreover, during the litigation, Defendant
13 contends that Plaintiff's counsel violated ethical rules by improperly soliciting and
14 engaged in the unauthorized practice of law by representing David Tavitian, a third-party
15 witness, who is also the father of Plaintiff Adam Tavitian, at his deposition in Indiana.
16 Moreover, Plaintiff's counsel may have engaged in improper solicitation of third-party
17 witness Emad Salama by contacting him in person and offering to represent him for
18 purposes of his deposition and potentially any claims made against him concerning his
19 work on Tavitian's vehicle. Plaintiff's counsel responds that they did not act improperly
20 by representing David Tavitian solely for the purpose of the deposition and did so
21 without charging him a fee. As to representing Salama at his deposition, they claim that
22 Defendant presents no legal authority to support its argument.

23 In the Court's prior order on July 25, 2017, the Court denied Defendant's motion
24 to deny class certification as premature. (Dkt. No. 115.) The Court conducted an in-
25 depth analysis on the adequacy of counsel under Rule 23(a)(4) and related Rule 23(g).
26 (Dkt. No. 115 at 3-5.) The Court concluded that Plaintiffs had satisfied Rule 23(g)(A) by
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1 showing that counsel has been diligently prosecuting the case and expended substantial
2 resources to represent the class, and counsel had extensive experience in class actions,
3 particularly in automotive defect class actions. (Id. at 5-6.) In considering other factors
4 under Rule 23(g)(B), the Court concluded that “Plaintiffs’ counsel’s failure to
5 communicate Defendant’s settlement offer was contrary to California Rule of
6 Professional Conduct 3-510 which raises a question as to counsels’ integrity and
7 trustworthiness to represent the interests of the class.” (Id. at 12.) The Court noted, there
8 were reasons, albeit incorrect, why Plaintiffs’ counsel did not believe they needed to
9 communicate the settlement offer.” (Id.) Based on a review of the cases, the Court
10 concluded that failure of counsel to communicate a settlement offer, itself, does not
11 demonstrate inadequacy of counsel under Rule 23(a)(4) and Rule 23(g). (Id. at 9.)

12 Adequate representation depends upon “an absence of antagonism [and] a sharing
13 of interests between representatives and absentees.” Molski v. Gleich, 318 F.3d 937, 955
14 (9th Cir. 2003), overruled on other grounds by Dukes v. Wal-Mart Stores, Inc., 603 F.3d
15 571 (9th Cir. 2010). In Radcliffe v. Experian Info. Solutions, 715 F.3d 1157, 1167-68
16 (9th Cir. 2013), the Ninth Circuit held the class representatives were inadequate because
17 they faced significantly different financial incentives than the rest of the class due to the
18 conditional incentive awards that were built into the structure of the settlement, and
19 accordingly held that class counsel was also inadequate “because as soon as the
20 conditional-incentive-awards provision divorced the interests of the class representatives
21 from those of the absent class members, class counsel was simultaneously representing
22 clients with conflicting interests.” Id. at 1167.

23 In support of its argument, Defendant cites to In the Matter of Coale, 775 N.E. 2d
24 1079, 1080-81 (Ind. 2002) for the proposition that Plaintiff’s counsel violated Indiana law
25 by soliciting David Tavitian. In Coale, two out-of-state attorneys were disciplined for
26 their acts of solicitation seeking to represent survivors and family members of those
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1 killed in a cargo plane crash in Indiana. Id. at 1080-81. The attorneys send letters, tapes,
2 and folders to the victims' families and survivors attempting to procure them as clients
3 without using the words "advertising material." Id. at 1081. The Supreme Court of
4 Indiana held that while mail solicitation of prospective clients is permitted, attorneys
5 must comply with Indiana law concerning its content. Id. at 1083. In the case, the
6 attorneys failed to label the materials as "advertising materials", failed to file the
7 materials with the Commission prior to disseminating them, and contained "false,
8 fraudulent, misleading, deceptive, self-laudatory or unfair statements or claims" in
9 violation of the Rules of Professional Conduct. Id. at 1084. The facts in Coale are
10 distinguishable from the facts in this case and are not supportive of Defendant's
11 argument.

12 Here, Defendant does not cite to a specific provision of the Indiana Rules of
13 Professional Conduct that was violated by Plaintiff's counsel. In response, Plaintiff cites
14 to the following relevant Indiana Rules of Professional Conduct, "[a] lawyer . . . shall not
15 by in-person, live telephone, or real-time electronic contact solicit professional
16 employment from a prospective client when a significant motive for the lawyer's doing
17 so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a
18 family, close personal, or prior professional relationship with the lawyer." Ind. Prof.
19 Cond. R. 7.3(a). Also, a "lawyer who is not admitted to practice in this jurisdiction, but
20 is admitted in another United States jurisdiction, and not disbarred or suspended from
21 practice in any jurisdiction, may provide legal services on a temporary basis in this
22 jurisdiction that . . . and arise out of or are reasonably related to the lawyer's practice in a
23 jurisdiction in which the lawyer is admitted to practice." Ind. Prof. Cond. R. 5.5(c)(4).

24 Plaintiff's counsel claims the representation of David Tavitian was a courtesy for
25 Plaintiff Adam Tavitian solely for the purposes of the deposition and the representation
26 was done without charge to David. Therefore, there was no violation of the Indiana
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1 Rules of Professional Conduct. The Court agrees and concludes that Defendant has
2 failed to demonstrate an ethical violation under the Indiana Rule of Professional Conduct.
3 FCA also claims there is a conflict of interest because David testified that he does not
4 believe Plaintiff's vehicle has a defect, but FCA does not explain how David's testimony
5 will be used at trial and how it conflicts with Plaintiff's counsels' representation of the
6 class.

7 As to Salama, Defendant claims that Plaintiff's counsel's representation of Salama
8 "may" violate California Rules of Professional Conduct 1-400 but fails to specifically cite
9 to the provision that applies. Rule 1-400 is entitled "Advertising and Solicitation" with
10 many provisions which Defendant fails to specifically reference. Moreover, FCA
11 provides no authority that Plaintiff's counsel cannot represent a third party witness.
12 Lastly, FCA's argument that Salama potentially bears liability for one of the repairs at
13 tissue is also unavailing. The Court denied FCA's motion for leave to file a third party
14 complaint against Salama and FCA has not indicated that it intends to file a separate
15 lawsuit seeking relief against Salama.

16 Besides Plaintiff's counsel's failure to communicate a settlement offer, which by
17 itself, does not demonstrate inadequacy of counsel, Defendant has not demonstrated that
18 Plaintiff's counsel's representation is inadequate. Thus, the Court concludes that
19 Plaintiff's counsel is adequate pursuant to Rule 23(a).

20 **b. Adequacy of Plaintiff Victorino**

21 Defendant argues that Victorino lacks sufficient knowledge of the claims and
22 events in this case and he has given total control of his case to his attorneys to make all
23 decisions, including whether to accept or reject a settlement. FCA asserts there is no
24 evidence that Plaintiff is in charge of his own case.⁷ In response, Victorino cites to his
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27 ⁷ FCA's argument concerning the purchase of used vehicles is addressed on the predominance factor.

1 deposition testimony where he testified that he keeps up to date with his attorneys and
2 looks into the case from time to time and has read all the documents his attorneys have
3 sent him. (Dkt. No. 244-1, Lurie Decl., Ex. 2 at Victorino Depo. at 171:12-172:7.) He
4 stated that the class is made up of anyone that is affected by the clutch defect. (Id. at
5 174:25-175:6.) Based on these statements, the Court concludes that Victorino is an
6 adequate representative.

7 In sum, based on the reasoning above, the Court concludes the Rule 23(a) factors
8 have been met.

9 **C. Federal Rule of Civil Procedure 23(b)(3)**

10 Under Rule 23(b)(3), the plaintiff must demonstrate “that a class action is superior
11 to other available methods for fairly and efficiently adjudicating the controversy” and that
12 “the questions of law or fact common to class members predominate over any questions
13 affecting only individual members.” Fed. R. Civ. P. 23(b)(3). Predominance is satisfied
14 “[w]hen common questions present a significant aspect of the case and they can be
15 resolved for all members of the class in a single adjudication.” Hanlon, 150 F.3d at 1022
16 (quoting Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and
17 Procedure § 1777 (2d ed. 1986)). Superiority requires a consideration of “(A) the class
18 members’ interests in individually controlling the prosecution or defense of separate
19 actions; (B) the extent and nature of any litigation concerning the controversy already
20 begun by or against class members; (C) the desirability or undesirability of concentrating
21 the litigation in the particular forum; and (D) the likely difficulties in managing a class
22 action.” Fed. R. Civ. P. 23(b)(3)(a)-(d). In addition, class damages must be sufficiently
23 traceable to plaintiff’s liability case. See Comcast Corp. v. Behrend, 133 S. Ct. 1426,
24 1433 (2013).

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a. Nationwide Implied Warranty Class

Plaintiff’s argument that he does not have to address any choice of law or due process issue is contradicted by settled law. Because Plaintiff’s MMWA cause of action is premised on California’s Song-Beverly Act, Plaintiff must demonstrate that the application of California law to a nationwide class comports with due process. See Kas v. Mercedes-Benz USA, LLC, Case No. CV 11-1032-VBF(PJWx), 2011 WL 13238744, at *3 (C.D. Cal. Aug. 23, 2011) (while the plaintiff only alleged one claim of a nationwide class under the MMWA, “[u]ltimately, Plaintiff must demonstrate that the differences in state laws implicated by the putative class action are nonmaterial” where the plaintiff claimed the MMWA incorporated the state law warranty standard) (citing Walsh v. Ford Motor Co., 807 F.2d 1000, 1016 (D.C. Cir. 1986) (“state warranty law lies at the base of all warranty claims under Magnuson-Moss”)).

1 Certifying a nationwide class under the MMWA which is based on California's
2 Song-Beverly Act must comport with due process. See Phillips Petroleum, Co. v. Shutts,
3 472 U.S. 797, 818 (1985). A forum state, may apply its own substantive law to claims of
4 a nationwide class without violating the federal due process clause if the forum state has
5 a “‘significant contact or significant aggregation of contacts’ to the claims asserted by
6 each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure
7 that the choice of [the forum state’s] law is not arbitrary or unfair.” Id. at 821-22.
8 “When considering fairness in this context, an important element is the expectation of the
9 parties.” Shutts, 472 U.S. at 822 (finding that parties could not expect that Kansas law
10 would control where 97% of plaintiffs did not reside in Kansas and 99% of gas leases at
11 issue were located outside Kansas).

12 “A federal court sitting in diversity must look to the forum state’s choice of law
13 rules to determine the controlling substantive law.” Mazza, 666 F.3d at 589 (quoting
14 Zinser v. Accufix Research Inst., 253 F.3d 1180, 1187 (9th Cir. 2001)). Here, the Court
15 has diversity jurisdiction under 28 U.S.C. § 1332(d), (Dkt. No. 104, FAC ¶ 57), the Class
16 Action Fairness Act; therefore, it applies California’s choice-of-law rules. See Bruno v.
17 Quten Research Inst., LLC, 280 F.R.D. 524, 538 n. 7 (C.D. Cal. 2011). “Under
18 California’s choice of law rules, the class action proponent bears the initial burden to
19 show that California has ‘significant contact or significant aggregation of contacts to the
20 claims of each class member.’” Wash. Mut. Bank v. Superior Ct., 24 Cal. 4th 906, 921
21 (2001). Once the plaintiffs have demonstrated that due process is satisfied, the burden
22 shifts to the defendants to demonstrate that the laws of another state should apply. Id.

23 In his motion, Plaintiff failed to conduct any due process analysis. However, in
24 reply, he alternatively argues, for the first time, that he can demonstrate that California
25 “has sufficient significant contacts to apply its own laws to citizens of foreign states” due
26 to the “expectation of the parties” under Shutts. He argues this expectation interest exists
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1 because “all 50 states have a shared interest in the predictability and uniformity of results
2 for claims based on the same course of conduct, as well as a related and shared interest in
3 the ease of applying the relevant law.” (Dkt. No. 244 at 17.) However, Plaintiff
4 misapplies and misunderstands the “expectation of the parties” element. The proper
5 focus is on the parties’ contacts with the forum state demonstrating “significant contact or
6 significant aggregation of contacts” by defendants in the forum state that would
7 determine the expectation of the parties that California’s implied warranty law would
8 apply to a nationwide class. See AT&T Mobility LLC v. AU Optronics Corp., 707 F.3d
9 1106, 1113 (9th Cir. 2013) (after determining defendant’s conduct within the state was a
10 “significant aggregation of contacts”, defendant could not complain that application of
11 California law outside of state would be unfair when the alleged conspiracy took place, in
12 part, in California). An analysis under Shutts focuses on the plaintiffs’ and defendants’
13 contacts with the forum state. In re Seagate Tech Sec Litig., 115 F.R.D. 264, 270, 272
14 (N.D. Cal. 1987). Here, Plaintiff wholly fails to address his and Defendant’s contacts
15 with California.

16 Plaintiff also summarily argues that because the MMWA is covered by the
17 Uniform Commercial Code, (“UCC”), and that the “U.C.C. has been considered by every
18 state and adopted in some form by nearly all, FCA could reasonably expect that the
19 controlling law, pursuant to Mag-Moss, would conform to the U.C.C.” (Dkt. No. 244 at
20 18.) He has not provided any legal authority that FCA could reasonably have expected
21 California law to apply nationwide because of the UCC and has failed to sufficiently
22 demonstrate that due process would not be violated by the application of California law
23 to a nationwide class.

24 Because Plaintiff has not met the initial burden of demonstrating that due process
25 is satisfied for purposes of a nationwide class, he cannot demonstrate that common issues
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1 predominate over the different questions posed by each state’s law. Accordingly, the
2 Court DENIES Plaintiff’s motion to certify a Nationwide Implied Warranty Class.

3 **b. California Implied Warranty Class**

4 **i. Whether Merchantability Satisfies Predominance**

5 The remaining causes of action require Plaintiff to establish that the Class Vehicles
6 are not merchantable. Plaintiff argues that common issues and common evidence exist
7 on whether the Class Vehicles are “merchantable” and whether the defects constitute an
8 unreasonable safety risk. He claims that all Class Vehicles inherently contain the same
9 defectively designed Clutch System and involve a serious safety risk. (Dkt. No. 232-5,
10 D’Aunoy Decl., Ex. C, Stapleford Expert Report at 18.) He also asserts that by
11 implementing the X62 Extended Warranty repair for all Class Vehicles, FCA
12 acknowledged that the defect was inherent in all vehicles at the time of sale which
13 presents common proof as to whether the class vehicles were merchantable.

14 In opposition, Defendant argues that the alleged defect is not a common issue
15 because each Class Vehicle has component parts that are manufactured differently where
16 all reservoir hoses are not manufactured with the same amount of plasticizer, all CMCs
17 are not manufactured the same size and all seals are not positioned the same way on
18 every CMC. (Dkt. No. 229-1, Benson Decl. ¶ 18.) As a result, FCA determined that
19 only 16% of the Class Vehicles could be affected by the clutch pedal sticking condition
20 due to swelling of the seals caused by the leaching plasticizer. (Id. ¶¶ 18, 19.) According
21 to FCA, the existence of a defect depends entirely on the amount of plasticizer in the
22 reservoir hose, the size and position of the clutch system seals and the level of the
23 varying tolerances. Therefore, the factors necessary for the defect to exist will vary for
24 each vehicle and require individual inquiries that defeat predominance.

25 Plaintiff argues that the proper focus for merchantability is the condition of the
26 product at the time of sale, and therefore, any individual issues raised by Defendant on
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1 whether the defect manifested in all Class Vehicles, whether the reservoir hose was
2 actually defective, whether the defect resulted in contamination of the clutch system, and
3 issues concerning failure rates, the efficacy of the X62 Extended Warranty repair and the
4 nature of the rubber seals and reservoir hoses are merit inquiries, and not ones conducted
5 at class certification.

6 On a breach of implied warranty claim, while a current manifestation of a current
7 defect is not an element of a claim, a plaintiff must instead provide “substantial evidence
8 of a defect that is substantially certain to result in malfunction during the useful life of the
9 product.” Hicks, 89 Cal. App. 4th at 918. On class certification, it is established that
10 proof of a current manifestation of a defect for a warranty claim is not required. See
11 American Honda Motor Co. v. Superior Ct., 199 Cal. App. 4th 1367, 1375 (2011)
12 (“Hicks and Wolin are in agreement that proof of current manifestation of the defect is
13 not necessary in a breach of warranty class action”); Wolin, 617 F.3d at 1173 (“proof of
14 the manifestation of a defect is not a prerequisite to class certification.”) (citing Blackie v.
15 Barrack, 524 F.2d 891, 901 (9th Cir. 1975) (“[N]either the possibility that a plaintiff will
16 be unable to prove his allegations, nor the possibility that the later course of the suit
17 might unforeseeably prove the original decision to certify the class wrong, is a basis for
18 declining to certify a class which apparently satisfies the Rule.”)).

19 In Wolin, the Ninth Circuit concluded that the district court erred by denying
20 certification because the plaintiffs, alleging violations of Michigan and Florida’s
21 consumer protection and breach of warranty claims, did not prove that the defect, an
22 alignment geometry defect that causes tires to prematurely wear, manifested in a majority
23 of the class’s vehicles. 617 F.3d at 1173. Moreover, the Ninth Circuit rejected the
24 defendant’s argument and evidence that the class members’ vehicles do not have the
25 same common defect because tire wear can be due to individual factors such as driving
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1 habits and weather. Id. It held that manifestation of a current defect is not required at
2 class certification. Id.

3 In American Honda, the California court of appeal rejected the Ninth Circuit's
4 ruling in Wolin and held that while plaintiffs moving for class certification do not have to
5 demonstrate a current manifestation of a defect, they "must provide substantial evidence
6 of a defect that is substantially certain to result in malfunction during the useful life of the
7 product." 199 Cal. App. 4th at 1375. It noted that the inquiry must be made when
8 determining the merits of the plaintiffs' claim but also when determining class
9 certification. Id. The court of appeal reversed the trial court's ruling because it relied on
10 Wolin and distinguished Wolin as not addressing California law but dealt with federal
11 procedural law, and Florida and Michigan substantive state law. Id. at 1375-76. The
12 Court notes that Wolin did not have occasion to address the issue of whether additional
13 evidence by plaintiff was needed to show a defect that will substantially result in
14 malfunction during the useful life of the product at the class certification stage.

15 Since American Honda, district courts are divided as to whether determining class
16 certification of a breach of the implied warranty under California law requires a class
17 representative plaintiff to demonstrate, with evidence, an inherent defect which is
18 "substantially certain to result in malfunction during the useful life of the product." See
19 Torres v. Nissan N. America Inc., Case No. CV 15-3251 RGK(FFMx), 2015 WL
20 5170539, at *5 (C.D. Cal. Sept. 1, 2015) (denying class certification on warranty claims
21 because plaintiffs failed to provide evidence that "all class members are substantially
22 certain to experience a malfunction from the alleged defect."); but see Keegan, 284
23 F.R.D. at 535 (granting class certification on implied warranty claim without requiring
24 evidence that "all class members are substantially certain to experience a malfunction
25 from the alleged defect."); Miller v. Fuhu, Inc., 14cv6119-CAS-AS, 2015 WL 7776794,

1 at *14 (C.D. Cal. Dec. 1, 2015) (following Keegan and related cases and finding common
2 questions predominated on warranty claim).

3 In Keegan, after carefully reviewing the courts’ analysis in Wolin, American
4 Honda Motor Co., and Hicks, the district court explained that the American Honda court
5 appears to have conflated California’s substantive law on breach of warranty and
6 California’s procedural law governing class certification. Keegan, 284 F.R.D. at 535.
7 The Keegan court concluded that while the court of appeal in American Honda applied
8 California procedural law, it must follow federal procedural law. Id. at 535-36 (“the
9 court cannot discern why, at the class certification stage, plaintiffs must adduce evidence
10 that a defect is substantially certain to arise in all class vehicles during the vehicles’ useful
11 life. A merits inquiry will resolve that question in one stroke”). Applying federal
12 procedural law on class certification as applied by the Ninth Circuit in Wolin, the district
13 court in Keegan granted class certification on the breach of implied warranty claim
14 concluding that the claim is susceptible to common proof. Id. at 536. It concluded that
15 the question of whether the design defect is “substantially certain” to manifest can be
16 answered in “one stroke.” Id. at 537.

17 The Court finds Keegan’s reasoning persuasive as it applies federal procedural law
18 on class certification. On class certification, the Ninth Circuit has cautioned that the
19 district court should not determine the merits of any claims. Ellis, 657 F.3d at 981;
20 ConocoPhillips Co., 593 F.3d at 808 (“court may not go so far . . . as to judge the validity
21 of these claims.”). The requirement of American Honda that a plaintiff must demonstrate
22 that all class members’ vehicles’ defect will substantially be certain to experience a
23 malfunction from the alleged defect during its useful life is a determination on the merits
24 which this Court does not find proper on class certification. See id. Therefore, the Court
25 concludes that Plaintiff does not have to demonstrate a manifestation of a current defect
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1 or that there is a substantial certainty of manifestation in the future but only to show that
2 his claim of breach of implied warranty is susceptible to common proof.

3 In this case, Mr. Stapleford opined that all Class Vehicle inherently contain the
4 same defectively designed Clutch System at the time of sale. (Dkt. No. 232-5, D'Aunoy
5 Decl., Ex. C, Stapleford Expert Report at 18 (UNDER SEAL).) Because the leaching
6 plasticizer causes the swelling of rubber components throughout the Clutch System, and
7 causes premature wearing on these components, the X62 Extended Warranty repair was
8 inadequate. (Id.) The plasticizer that leached into the hydraulic fluid causing
9 contamination will eventually cause damage to the CSC seal and the clutch system
10 malfunction “[will] likely to occur at some point in time in all of the Class Vehicles.”
11 (Id.) Plaintiff’s allegation of a common defect present in all Class Vehicles at the time of
12 purchase and that the defect will likely occur at some point during the lifetime of the
13 class vehicles demonstrate predominance of common issues on the claim for breach of
14 implied warranty. Defendant raises numerous issues that would require individual
15 inquiries such as the different reasons why the clutch system can fail and that only 16%
16 of the Class Vehicles could be affected by the condition; however, these are not relevant
17 when ruling on a motion for class certification. Thus, Defendant’s argument that
18 predominance is not met due to the individual questions arising to determine whether the
19 Class Vehicles are merchantability is without merit.

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1 **ii. Whether Class Definition Satisfies Predominance**⁸

2 Next, Defendant argues that the Song-Beverly Act only applies to “new” goods
3 sold or leased at retail in California for personal, family or household use, and the class is
4 overbroad because it includes owners of the Class Vehicles that are used. See Cal. Civ.
5 Code §§ 1791(a), 1792. Plaintiff responds that the implied warranty applies to leases of
6 new or used consumer goods, Cal. Civ. Code § 1795.4, and to the sale of used consumer
7 goods that are accompanied by an express warranty. Cal. Civ. Code § 1795.5. In their
8 sur-sur-reply, and at oral argument, Plaintiff agrees with Defendant that the Song-Beverly
9 Act does not apply to vehicles purchased used from private parties but it applies to used
10 vehicles purchased from authorized dealerships as they are “distributors” or “retail
11 sellers” of FCA under section 1795.5.

12 The Song-Beverly Act’s breach of implied warranty applies to sales of “consumer
13 goods” which are defined as “new product[s].” Cal. Civil Code §§ 1791, 1792; however,
14 it also applies to “used consumer goods” that are covered by an express warranty where
15 the obligation is on behalf of the distributor or retail seller and “not the original
16 manufacturer, distributor, or retail seller.” See Cal. Civil Code § 1795.5⁹; see Johnson v.

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19 ⁸ In the motion for class certification, Plaintiff asserts that the class is identifiable and ascertainable.
20 However, the Ninth Circuit has declined to adopt an ascertainability and/or administrative feasibility
21 requirement for class plaintiffs to demonstrate for purposes of class certification explaining that “Rule
22 23 does not impose a freestanding administrative feasibility prerequisite to class certification.” Briseno
23 v. ConAgra Foods, Inc., 844 F.3d 1121, 1126, 1133 (9th Cir. 2017) (joining Sixth, Seventh, and Eighth
24 Circuits and declining to impose an additional hurdle beyond those delineated in Rule 23). The court
25 explained that policy concerns concerning administratively feasibility are already addressed by Rule 23.
26 Id. at 1133; see Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136-39 (9th Cir. 2016) (addressing an
27 overbroad class definition as part of predominance issue).

28 ⁹ “[T]he obligation of a distributor or retail seller of used consumer goods in a sale in which an express
warranty is given shall be the same as that imposed on manufacturer . . . except: (a) it shall be the
obligation of the distributor or retail seller making express warranties with respect to used consumer
goods (and not the original manufacturer, distributor, or retail seller making express warranties with
respect to such goods when new) to maintain sufficient service and repair facilities within this state to
carry out the terms of such express warranties.” Cal. Civ. Code § 1795.5.

1 Nissan N. America, Inc., 272 F. Supp. 3d 1168, 1178-79 (N.D. Cal. 2017) (section
2 1795.5 imposes obligation of warranties on the distributor or retail seller, not the original
3 manufacturer; therefore no cause of action against original manufacturer under Song-
4 Beverly Act where used vehicle was purchased from third party retail seller, CarMax).

5 While Plaintiff argues that authorized dealerships are FCA's "distributors" or
6 "retail sellers", they have provided no evidence of the relationship between FCA and its
7 authorized dealerships. See In re MyFord Touch Consumer Litig., 291 F. Supp. 3d 936,
8 950 (N.D. Cal. 2018) (section 1795.5 "does not create additional obligations on a
9 manufacturer vis-à-vis used car purchasers; rather, it simply states that the retailer or
10 distributor is also subject to whatever obligations already apply to the manufacturer.").
11 In In re MyFord Touch, the plaintiffs similarly argued that Ford was a "distributor" or
12 "retailer" of used vehicles under section 1795.5, but the court noted that the plaintiffs "do
13 not cite evidence to support that representation (nor is evidence cited of an agency
14 relationship between the dealers and Ford)." Id. Because there was no evidence to create
15 a triable issue of fact whether Ford was a retailer or distributor of used vehicles, the court
16 granted summary judgment in favor of the car manufacturer on the Song-Beverly Act's
17 implied warranty claim with respect to class members who purchased used vehicles. Id.

18 Similarly, here, Plaintiff has not provided any caselaw that has found an auto
19 manufacturer liable for used vehicles sales made by its authorized dealerships under
20 section 1795.5's used vehicle provision and has not presented any evidence that FCA is a
21 "retailer" or "distributor" of used vehicles through its authorized dealerships. See id.; see
22 Herrera v. Volkswagen Grp. of Am., Inc., Case No. SACV 16-364-CJC(JCGx), 2016 WL
23 10000085, at *5 (C.D. Cal. Sept. 9, 2016) (informing the plaintiff that he must plead
24 sufficient facts to create an inference that Defendant manufacturer is either a distributor
25 or retailer of used cars.) Therefore, section 1795.5 does not support Plaintiff's argument
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1 that the Song-Beverly Act applies to used vehicles purchased by class members from
2 FCA's authorized dealerships.

3 Plaintiff also argues the Song Beverly Act applies to vehicles purchased from an
4 authorized dealership either used or new as long as the used vehicle is sold with the
5 manufacturer's new car warranty and cites to Cal. Civil Code § 1793.22 and Jensen v.
6 BMW of N. America, Inc., 35 Cal. App. 4th 112, 123 (1995). Plaintiff relies on the
7 definition of "new motor vehicle" which includes a "motor vehicle sold with a
8 manufacturer's new car warranty." Jensen, 35 Cal. App. 4th at 123 (under section
9 1793.22, cars sold with a balance remaining on the manufacturer's new motor vehicle
10 warranty fall within definition of "new motor vehicle").

11 However, the definition of "new motor vehicle" under section 1793.22(e)¹⁰
12 specifically states it only applies to section 1793.2(d), which the Court concluded above
13 only applies to express warranties, and section 1793.22, the Tanner Consumer Protection
14 Act,¹¹ Cal. Civ. Code § 1793.22(e), which does not reference implied warranties.
15 Dagher v. Ford Motor Co., 238 Cal. App. 4th 905, 920 (2015) (noting "new motor
16 vehicle" as defined in section 1793.22(e)(2) applies to sections 1793.2(d) and 1793.22);
17 Leber v. DKD of Davis, Inc., 237 Cal. App. 4th 402, 409 (2015) ("If the Legislature had
18 intended the definition of 'new' vehicle in section 1793.22, subdivision (e) to apply
19 throughout the Act, it would not have explicitly limited its applicability. . . ."). In Jensen,
20 the court dealt with whether the plaintiff could seek relief against the manufacturer for
21 breach of an express warranty of her "new" car purchase by a dealership sold with the
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25 ¹⁰ "For the purposes of subdivision (d) of Section 1793.2 and this section [section 1793.22] . . . 'new
26 motor vehicle' means" Cal. Civil Code § 1793.22(e).

27 ¹¹ Section 1793.22, also known as the Tanner Consumer Protection Act, provides the reasonable number
28 of attempts to repair a vehicle before relief may be sought.

1 manufacturer's new car warranty and not a breach of the implied warranty. Jensen, 35
2 Cal. App. 4th at 112. Jensen is not supportive of Plaintiff's position.

3 Plaintiff has failed to demonstrate that the Song-Beverly Act imposes liability on
4 the car manufacturer for class members' purchase of used vehicles from authorized
5 dealerships. Thus, the class definition, to include "[a]ll persons who purchased or leased
6 in California, from an authorized dealership, a Dart Vehicle" is overbroad because the
7 class definition includes purchasers of used vehicles.

8 It is to be noted that district courts have the inherent power to modify overbroad
9 class definitions. Mazur v. eBay Inc., 257 F.R.D. 563, 568 (N.D. Cal. 2009) (citing
10 Hagen v. City of Winnemucca, 108 F.R.D. 61, 64 (D. Nev. 1985)); see also Powers v.
11 Hamilton Cnty. Public Defender Comm'n, 501 F.3d 592, 619 (6th Cir. 2007) ("district
12 courts have broad discretion to modify class definitions"); Schorsch v. Hewlett-Packard
13 Co., 417 F.3d 748, 750 (7th Cir. 2005) (noting that "[l]itigants and judges regularly
14 modify class definitions"); In re Monumental Life Ins. Co., 365 F.3d 408, 414 (5th Cir.
15 2004) ("District courts are permitted to limit or modify class definitions to provide the
16 necessary precision."). Despite the Court's inherent power to modify Plaintiff's class
17 definition, as discussed below, Plaintiff fails to demonstrate that his damages models
18 satisfy predominance. Thus, the Court declines to exercise its discretion to modify the
19 proposed class definition.¹² See Mazur, 257 F.R.D. at 568 (recognizing court's inherent
20 power to modify a class definition but declined to do so because class certification
21 motion failed on other grounds).

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26 ¹² Moreover, it is not clear whether Plaintiff is amenable to a modification of the class definition. In his
27 sur-sur-reply, he is firm that he seeks a class that includes both new and used purchasers of the Class
28 Vehicles. (Dkt. No. 254 at 8.)

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2 (1) Where the buyer has rightfully rejected or justifiably revoked acceptance
3 of the goods or has exercised any right to cancel the sale, Sections 2711,
4 2712, and 2713 of the Commercial Code shall apply.

5 (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the
6 Commercial Code shall apply, and the measure of damages shall include the
7 cost of repairs necessary to make the goods conform.

8 Cal. Civ. Code § 1794(b). The reference to section 1793.2(d) in section 1794(b) allows a
9 buyer the right of replacement or restitution for breach of an express warranty and does
10 not apply in this breach of implied warranty case. See Gavaldon v. DaimlerChrysler
11 Corp., 32 Cal. 4th 1246, 1263 (2004); Philips v. Ford Motor Co., Case No. 14cv2989-
12 LHK, 2016 WL 7428810, at *24 (N.D. Cal. Dec. 22, 2016) (noting buyer’s right to
13 replacement or restitution is available only for breach of an express warranty). In their
14 sur-sur-reply and at oral argument, Plaintiff asserts that the court in Gavaldon, 23 Cal. 4th
15 at 1259, provides a strong argument that the replacement and restitution remedies apply
16 to implied warranty. However, Gavaldon did not hold that section 1793.2(d) applies to
17 implied warranty claims and courts have held the contrary. See Keegan, 838 F. Supp. 2d
18 at 948 n. 55 (section 1793.2(d) does not apply to claims for breach of implied warranty)
19 (citing Mocek v. Alfa Leisure, Inc., 114 Cal. App. 4th 402, 406-08 (2003) (“The Act’s
20 provisions requiring repairs after breach of an express warranty are lengthy and detailed.
21 There is no reason to believe failure to set out the same process in case of a breach of the
22 implied warranty of merchantability was an oversight”)); Music Acceptance Corp. v.
23 Lofing, 32 Cal. App. 4th 610, 620 (1995) (section 1793.2 applies only to express
24 warranties and has no relevance to the implied warranty of merchantability). One court
25 of appeal stated the proposition that section 1793.2(d) does not apply to implied warranty
26 claims is “clearly established law.” Brand v. Hyundai Motor America, 226 Cal. App. 4th
27 1538, 1548 (2014) (“clearly established law ‘reject[s] the . . . argument’ that express
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1 warranty provisions ‘concerning replacement or repair of defective goods should be
2 applied’ to implied warranty breaches.”). In fact, section 1793.2(d) expressly states that
3 “if the manufacturer . . . does not service or repair the goods to conform to the applicable
4 *express* warranties after a reasonable number of attempts, the manufacturer shall either
5 replace the goods or reimburse the buyer. . . .” Cal. Civ. Code § 1793.2(d) (emphasis
6 added). Plaintiff’s attempt to extend Gavaldon’s holding to implied warranty claims is
7 not legally supported.

8 Based on the facts of this case, it appears that section 1794(b)(2) applies because
9 Plaintiff accepted the Dodge Dart vehicles. Under the damages provision, “[w]here the
10 buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall
11 apply, and the measure of damages shall include the cost of repairs necessary to make the
12 goods conform.” Cal. Civ. Code § 1794(b). Section 2714 of the California Commercial
13 Code provides that, “[t]he measure of damages for breach of warranty is the difference at
14 the time and place of acceptance between the value of the goods accepted and the value
15 they would have had if they had been as warranted, unless special circumstances show
16 proximate damages of a different amount.” Cal. Com. Code § 2714.

17 In Guido v. L’Oreal, USA, Inc., Nos. CV 11-1067 CAS(JCx), 11-5465 CAS (JCx),
18 2013 WL 3353857, at *13 (C.D. Cal. July 1, 2013), the district court analyzed a statutory
19 damages claim under section 1794 for a claim of breach of an implied warranty and held
20 that the plaintiffs had not provided evidence to support statutory damages on a class wide
21 basis. Id. at *13. In Guido, the court described Commercial Code section 2714 as “the
22 monetary equivalent of the benefit of his bargain.” Id. at *14; Ironshore Specialty Ins.
23 Co. v. 23andMe, Inc., Case No. 14cv3286-BLF, 2015 WL 2265900, at *4 (N.D. Cal.
24 May 14, 2015) (“Under California law the remedies for breach of the implied warranty
25 include “benefit of the bargain” damages” citing to Commercial Code section 2714.).
26 The measure of damages was the difference between the “true market value” or what the
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1 class actually received and “the historical market value” or the value of the product in
2 merchantable condition and this provides a measure of class wide relief. Guido, 2013
3 WL 3353857, at *14. Because the plaintiff did not submit expert testimony
4 demonstrating a gap between the true market price and its historical market price, they
5 did not meet their burden of demonstrating common questions predominate over
6 individual ones. Id. at 16.

7 As noted above, Plaintiff did not conduct a damages analysis under section 2714
8 demonstrating the “difference at the time and place of acceptance between the value of
9 the goods accepted and the value they would have had if they had been as warranted.”
10 See Cal. Comm. Code § 2714. Instead, Plaintiff’s alternate damages theory, discussed
11 below, is described as a benefit of the bargain theory but upon closer inspection appears
12 to operate as a full refund model.

13 Plaintiff’s benefit of the bargain theory purports to measure the “economic harm
14 caused by FCA’s failure to disclose the alleged design defect at the point of sale or before
15 based on the difference in value between a defective and a defect-free Clutch System.”
16 (Dkt. No. 215-1 at 28.) According to Plaintiff’s damages expert, Steven Boyles, the
17 Clutch Defect can be cured and class members can be made whole and receive the value
18 they bargained for at the point of sale. (Dkt. No. 216-1, Zohdy Decl., Ex. K, Boyles
19 Decl. ¶ 9.) Boyles’ benefit-of-the-bargain model limits recovery to the difference in
20 value at the point of sale between a Class Vehicle with a defective clutch system and one
21 with a defect-free clutch system. (Id. ¶ 10.) This benefit of the bargain theory claims to
22 measure the “difference in the value represented and the value actually received (what the
23 vehicle is worth with and without the defect) and are susceptible of measurement across
24 the entire class.” (Id.) In arriving at this measurement, Boyles proposes that “[p]ayment
25 in the amount of the cost necessary to cure the Clutch Defect would make Class Members
26 whole and provide them with the benefit of their bargain.” (Id. ¶ 11.) According to
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1 Boyles, his formula, “(hours x labor rate + part cost)” “provides a measure of the
2 difference in value of a Class Vehicle without the defect as compared to a Class Vehicle
3 with the defect.” (Dkt. No. 239-2, Zohdy Decl., Ex. L, Boyles Decl. ¶ 26 (UNDER
4 SEAL).)

5 Defendant responds that Plaintiff’s damages model is essentially a full refund of an
6 allegedly defective component where it is clear that the reservoir hose, master cylinder
7 and slave cylinder components are not valueless. Defendant cites to a recent district
8 court decision in Nguyen v. Nissan North America, Case No. 16cv5591-LHK, 2018 WL
9 1831857, at *7 (N.D. Cal. April 9, 2018), where the plaintiffs’ counsel, the same counsel
10 in this case, argued the same damages theory, also by Plaintiff’s expert, Steven Boyles,
11 and the court held it did not satisfy predominance. In reply, Plaintiff disagrees with
12 Defendant arguing that his benefit of the bargain model is distinct from a full refund
13 model.

14 Boyles correctly states the theory behind the benefit of the bargain damages which
15 is to place the consumer in the position he or she would have been had he or she received
16 a merchantable product, which is the difference between the value of the item as
17 represented and the actual value of the item. (Dkt. No. 239-2, Zohdy Decl., Ex. L,
18 Boyles Decl. ¶ 16 (UNDER SEAL).) However, the formula he presents does not
19 correlate to his theory. Instead, Boyles’ benefit of the bargain damages formula provides
20 a full refund of the purchase price of the component parts and does not place the plaintiff
21 where he would have been when he purchased the car but, instead, overcompensates him.
22 Determining the difference between the value of the goods accepted and the value they
23 would have had if they had been as warranted necessarily assumes there is some value to
24 the products at the time of acceptance. Boyles’ formula impliedly determines that the
25 value of the accepted component part was \$0. It does not assess the difference between
26 the value of the component parts accepted and the value as merchantable.

1 In Nguyen, the plaintiff alleged a defect in the manual transmission of her vehicle
2 arguing that the CSC has a design flaw because of its material make-up, including plastic,
3 and does not effectively transfer heat. Nguyen v. Nissan N. America, Inc., Case No.
4 16cv5591-LHK, 2018 WL 1831857, at *1 (N.D. Cal. Apr. 9, 2018).¹³ As a result, the
5 hydraulic fluid boils as it circulates through the CSC causing air bubbles to form and
6 collapse which causes the fluid pressure to stop suddenly and prevents the CSC from
7 working properly and causing the vehicle's clutch to lose pressure and prevents the gears
8 from engaging/disengaging. Id. On motion for class certification, the plaintiff relied on a
9 purported benefit-of the bargain damages model offered by Steven Boyles, the same
10 expert in this case, for claims under the CLRA, Song-Beverly Act and the MMWA. (Id.
11 at 3.) As in this case, the benefit of the bargain damages model was represented as the
12 difference between the value represented by the defendant and the value actually received
13 or "what the vehicle is worth with and without the defect. Id. at *5. Boyles determined
14 damages to be the cost of an aluminum CSC, new hydraulic fluid, other necessary parts
15 and 3.9 hours of labor totaling \$723.95 to cure the defect. Id. The district court
16 explained that the damages proposed was in essence a full refund model. Id. Because the
17 difference between the value represented and the value received equals the cost to replace
18 the defective CSC then consumers would have deemed the defective part valueless. Id.
19 Boyles' damages model assumed the consumer received no value from the defective
20 CSC; however, the evidence in the case demonstrated that the plaintiff's extended use of
21 the CSC indicated some value to the plaintiff. Id. at *6. The court denied certification
22 based on Plaintiffs' failure to demonstrate predominance due to the damages model. Id.
23 at 8.

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26 ¹³ On April 23, 2018, the plaintiffs filed a petition for permission to appeal the district court's decision
27 with the Ninth Circuit.

1 Plaintiff, on the other hand, cites to Falco arguing the district court endorsed a
2 damages formula based on the benefit of the bargain which was similar to that offered by
3 Boyles. In Falco, the plaintiffs complained that their vehicles had a defective timing
4 chain system. Falco v Nissan N. America, Case No. CV 13-686 DDP, (MANx), 2016
5 WL 1327474, at *1 (C.D. Cal. Apr. 5, 2016). As to the statutory class that already had
6 repairs done, the plaintiffs sought restitution for amounts already spent to diagnose and
7 repair the defective timing chain systems. Id. at *2, *11. As to the fraud and breach of
8 warranty class, those who had not yet had the defective system fully repaired, the
9 plaintiffs sought the “benefit of the bargain damages” based on Nissan’s fraudulent
10 behavior inducing them to purchase the vehicles and had the defect been disclosed they
11 would have paid less. Id. at *2, *12. The benefit of the bargain was the “average amount
12 each member can expect to pay to have the defecting timing chain system repaired at an
13 authorized Nissan dealership.” Id. at *12. The Court concluded that the class wide
14 damage formula for the classes exist and as to the fraud based claims, “[b]y receiving
15 restitution in the amount of average repairs, the class would be getting the benefit of their
16 bargain they would be put in the same position they would have been had the car not
17 been sold with the defective timing chain system – it is the cost necessary to make the
18 vehicles conform to the value Plaintiffs thought they were getting in the price tendered.”
19 Id.

20 The court in Nguyen distinguished the ruling in Falco explaining it awarded
21 damages for the cost to repair the allegedly defective part rather than the cost to replace
22 it. Nguyen, 2018 WL 1831857, at *7. In addition, Judge Koh observed that the Falco
23 court failed to consider the possibility that awarding repair costs might overcompensate
24 the class members. Id.

25 The Court agrees with the reasoning in Nguyen, in part, as it relates to the issue of
26 overcompensation. A full refund of the purchase price of the component parts fails to
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1 correspond to Plaintiff's theory of liability because a full refund is not available for this
2 cause of action. If Plaintiff seeks damages based on the benefit of the bargain as asserted
3 by his expert, he needs to assess the "difference in the value represented and the value
4 actually received", (Dkt. No. 216-1, Zohdy Decl., Ex. K, Boyles Decl. ¶ 9), which a full
5 recovery fails to do.

6 The Court's ruling is confirmed by the recent Ninth Circuit decision in Philips v.
7 Ford Motor Co., 2018 WL 2752585 (9th Cir. June 8, 2018) affirming the district court's
8 exclusion of the plaintiffs' damages expert for failing to apply the "expected utility"
9 theory and resulting denial of class certification.¹⁴ In Phillips, the plaintiffs' expert
10 proposed an "expected utility" theory of damages on, *inter alia*, the implied warranty
11 claims. Philips, 2016 WL 7428810, at *19. The plaintiffs' theory of harm was that Ford
12 forced class members to accept a risk they did not bargain for when Ford failed to
13 disclose known defects in the vehicles' Electronic Power Assisted Steering ("EPAS")
14 system. Id. at *20. Therefore, the "expected utility" measured "consumers' perceptions
15 of the risk of failure and calculates consumers' willingness to pay based on these
16 measurements." Id. Despite the theory, the expert report determined that damages was
17 the total price of a new EPAS system. Id. However, the plaintiffs provided no evidence
18 that the expected utility of the EPAS was \$0; in fact, Ford produced evidence that the
19 expected failure rate for class vehicles was at most "approximately 1 percent." Id. at *21.

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22 ¹⁴ On June 11, 2018, Defendant filed a notice of supplemental authority in opposition to Plaintiff's
23 amended motion for class certification informing the Court of a recent Ninth Circuit decision in Philips
24 v. Ford Motor Co., 2018 WL 2752585 (9th Cir. June 8, 2019). (Dkt. No. 263.) Plaintiff objects to the
25 notice and asks the Court to strike it arguing that Philip has no relevance because this case is based on
26 the "benefit of the bargain" theory, not "expected utility." (Dkt. No. 264.) The Court disagrees. While
27 Plaintiff labels his damages model as the "benefit of the bargain" theory, the Court explains above that
the "benefit of the bargain" appears to operate as a full refund model. Similarly, in Philips, while the
28 plaintiffs labeled their damages model, "expected utility", in essence, they were seeking a full refund
price of the EPAS system for breach of implied warranty claims. Philips is relevant to the analysis in
this case. The Court declines to strike the notice of supplemental authority.

1 Because the plaintiffs were essentially seeking a full refund without demonstrating there
2 was \$0 value to the EPAS system, the district court concluded that the plaintiffs failed to
3 produce a damages model consistent with their liability. Id. at *21-22.

4 Similarly, in this case, while Plaintiff has set forth a damages model, benefit of the
5 bargain, that is consistent with his theory of liability, in application, he applies a full
6 refund model which does not comport to damages under a breach of the implied warranty
7 requiring an assessment of the “difference in the value represented and the value actually
8 received.” Thus, the formula’s application proposed by Boyles does not establish that
9 damages can be measured on a classwide basis as individual inquiries will predominate in
10 assessing the value of the Clutch System components actually received. In conclusion,
11 Court finds that predominance has not been met on the issue of damages.¹⁵

12 Because the Court concludes that predominance has not been met on the issue of
13 damages, a class action is not maintainable under Rule 23(b)(3).

14 **D. Rule 23(b)(2)**

15 In his moving brief, Plaintiff asserts, in one sentence, that he seeks a declaration
16 pursuant to Rule 23(b)(2) that the Clutch Defect is safety related and an order
17 “compelling Defendant to remove, repair, and/or replace the Class Vehicles’ defective
18 Clutch System components with suitable alternative components that do not contain the
19 defect(s) alleged herein.” (Dkt. No. 215 at 10.) Defendant opposes arguing the case is
20 about the recovery of money damages, and therefore, Rule 23(b)(2) certification should
21 be denied. In reply, Plaintiff provides additional analysis on this issue.

22 Plaintiff seeks to certify a damages class for his breach of implied warranty claims
23 under Rule 23(b)(3) and a class for injunctive relief under Rule 23(b)(2) arguing that the
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26 ¹⁵ Because Plaintiff has not met the predominance factor, the Court need not address superiority. See
27 Soares v. Flowers Food, Inc., 320 F.R.D. 464 484 (2017).

1 Song-Beverly Act provides for both legal and equitable remedies and the UCL provides
2 broad remedial relief. Despite this general proposition, he provides no legal authority for
3 his attempt to obtain both damages and injunctive relief. See Phillips, 2016 WL
4 7428810, at *24 (“Plaintiffs point to no caselaw, and the Court is aware of none, granting
5 an injunction” “for repair or replacement despite having an adequate remedy at law.”).

6 Rule 23(b)(2) permits class treatment when “the party opposing the class has acted
7 or refuses to act on grounds that apply generally to the class, so that final injunctive relief
8 or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed.
9 R. Civ. P. 23(b)(2). “The fact that some class members may have suffered no injury or
10 different injuries from the challenged practice does not prevent the class from meeting
11 the requirements of Rule 23(b)(2).” Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir.
12 2009). For Rule 23(b)(2) certification, Plaintiff must show that “(1) the opposing party's
13 conduct or refusal to act must be ‘generally applicable’ to the class and (2) final
14 injunctive or corresponding declaratory relief must be requested for the class.”
15 Cholakyan v. Mercedes-Benz, USA, LLC, 281 F.R.D. 534, 558 (C.D. Cal. 2012)
16 (quoting 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice
17 and Procedure: Civil 3d § 1775, at 41 (2005)). The Advisory Committee Note states that
18 certification under Rule 23(b)(2) “does not extend to cases in which the appropriate final
19 relief relates exclusively or predominantly to money damages.” Fed. R. Civ. P. 23
20 advisory committee's note (1966).

21 In Dukes, the Supreme Court held that the claims for backpay were not properly
22 certified under Rule 23(b)(2) and held that a Rule 23(b)(2) class may not be certified
23 where the “monetary relief is not incidental to the injunctive or declaratory relief.” 564
24 U.S. at 360. “The key to the (b)(2) class is the indivisible nature of the injunctive or
25 declaratory remedy warranted-the notion that the conduct is such that it can be enjoined
26 or declared unlawful only as to all of the class members or as to none of them.” Id.

1 (quotation and citation omitted). “When a class seeks an indivisible injunction
2 benefitting all its members at once, there is no reason to undertake a case-specific inquiry
3 into whether class issues predominate or whether class action is a superior method of
4 adjudicating the dispute. Predominance and superiority are self-evident.” Id. at 362-63.
5 In Dukes, the backpay class involved individualized awards of monetary damages
6 because the defendant was entitled to individualized determinations of each employee’s
7 eligibility for backpay and injunctive relief could not be applied to the entire class. Id. at
8 360-61. The backpay issue would require additional court proceedings to determine the
9 scope of individual’s relief. Id.

10 Courts have stated that a Rule 23(b)(2) and a separate Rule(b)(3) class may be
11 certified in the appropriate case. Kartman v. State Farm Mut. Auto. Ins. Co., 634 F.3d
12 883, 895 (7th Cir. 2011), cert. denied 132 S. Ct. 242 (2011) (“[I]n an appropriate case, a
13 Rule 23(b)(2) class and a Rule 23(b)(3) class may be certified where there is a real basis
14 for both damages and an equitable remedy.”) (citations omitted); In re ConAgra Foods,
15 Inc., 90 F. Supp. 3d 919, 977 (C.D. Cal. 2015) (“[T]he court can separately certify an
16 injunctive relief class and, if appropriate, also certify a Rule 23(b)(3) damages class” and
17 citing Ninth Circuit cases suggesting certification of separate Rule 23(b)(2) and 23(b)(3)
18 classes). However, in Kartman and In re ConAgra Foods, certification was denied under
19 Rule 23(b)(2).

20 In Kartman, the Seventh Circuit held that an injunctive relief class was not justified
21 because an injunction was not a proper remedy for an alleged “underpayment of their
22 insurance claims for hail damage to their roofs.” 634 F.3d at 888-89. Injunctive relief
23 must be “appropriate” and must seek “final injunctive relief.” Id. at 886. In Kartman,
24 injunctive relief would not provide “final” relief under Rule 23(b)(2) because the
25 injunction requiring State Farm to reinspect all class members’ roofs pursuant to a
26 uniform and objective standard for evaluating hail damage provides an “evidentiary
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1 foundation for subsequent determinations of liability.” Id. at 893. The injunction
2 proposed would not result in “final relief.” In fact, the injunction would result in
3 thousands of individual proceedings to determine breach and damages. Id. The court
4 further explained that the underpayment of insurance claims for hail damage is an action
5 for damages and not a dual remedy sought of an injunction plus damages. Id. at 888-89.

6 Similarly, Plaintiff’s claim the common injury is the overpayment of the purchase
7 price of their Class Vehicles and therefore, monetary damages is the appropriate form of
8 damages. See id.; see Philips, 2016 WL 7428810, at *25; McManus v. Fleetwood
9 Enters., Inc., 320 F.3d 545, 553 (5th Cir. 2003) (reversing the district court’s class
10 certification of Rule 23(b)(2) class because the ordinary relief for breach of warranty was
11 money damages, not injunctive relief). In Philips, a car defect case, the district court
12 denied the plaintiff Rule 23(b)(2) certification seeking an injunction requiring the
13 manufacturer to “uniformly repair and/or replace the defective EPAS systems in each of
14 the Class Vehicles” because the ordinary relief under the Song-Beverly Act is money
15 damages. Id. at *25 (the court also denied certification under Rule 23(b)(3) based on the
16 plaintiffs’ damages model).

17 Both parties cite to Cholakyan v. Mercedes-Benz, USA, LLC, 281 F.R.D. 534
18 (C.D. Cal. 2012) in support. The district court in Cholakyan denied Rule 23(b)(2)
19 certification for numerous reasons, one of which was the declaration and injunction
20 would not benefit the class as a whole because former owners of the class vehicles would
21 not benefit from the injunction and Rule 23(b)(2) requires that the plaintiff seek “an
22 indivisible injunction benefitting all its members at once.” Id. at 559. In this case, the
23 class definition includes those who purchased and sold their vehicles; therefore, Plaintiff
24 has not demonstrated that the injunction he seeks is applicable to the entire class. Those
25 who purchased and then sold their vehicles would not get the benefit of the injunction.

Moreover, those class members who have already gotten the repairs done on their vehicles would not obtain the benefit of the injunction.

Accordingly, Plaintiff has failed to demonstrate that a Rule 23(b)(2) class may be certified.¹⁶ In sum, the Court DENIES Plaintiff's motion for class certification for failing to satisfy Rule 23(b).

F. Defendant's Evidentiary Objections

Defendant filed evidentiary objections to Plaintiffs' amended motion for class certification to Victorino's and Tavitian's recent declarations dated April 5, 2018 that contradict their deposition testimony taken in April 2017. (Dkt. No. 229-24.) FCA also objects to Exhibit Z to D'Aunoy's declaration. (*Id.*) Plaintiffs oppose. (Dkt. No. 244-2.)

In considering a motion for class certification, strict adherence to the Federal Rules of Evidence is not required and inadmissible evidence may be considered. Gonzalez v. Millard Mall Servs., Inc., 281 F.R.D. 455, 459 (S.D. Cal. 2012) (citing Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178 (1974)); Dominguez v. Schwarzenegger, 270 F.R.D. 477, 483 n. 5 (N.D. Cal. 2010) (citations omitted); Smith v. Microsoft Corp., 297 F.R.D. 464, 473-74 (S.D. Cal. 2014) (courts may consider inadmissible evidence in determining whether a class should be certified). Therefore, the Court may consider the alleged sham affidavits of Victorino and Tavitian as well as Exhibit Z to D'Aunoy's declaration.

Moreover, the Court notes that the sham affidavit rule that FCA relies on for exclusion addresses evidentiary objections in summary judgment motions, not motions for class certification. "[A] party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn

¹⁶ The Court notes that Plaintiff provides no discussion of the UCL claim as it relates to the breach of implied warranty in his motion for class certification. He only addresses the UCL summarily when addressing that he seeks to certify a class under Rule 23(b)(2). Because the Court denies class certification on the breach of implied warranty claims, and Plaintiff's failure to adequately address the UCL claim, the Court declines to address the UCL claim predicated on the same claims.

1 statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn
2 deposition)” Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999); Van
3 Asdale v. Int'l Game Tech., 577 F.3d 989, 998 (9th Cir. 2009) (“[A]s we have explained,
4 if a party who has been examined at length on deposition could raise an issue of fact
5 simply by submitting an affidavit contradicting his own prior testimony, this would
6 greatly diminish the utility of summary judgment as a procedure for screening out sham
7 issues of fact.”). Therefore, in order for the sham affidavit rule to apply, the court must
8 make a factual determination that the contradiction was actually a “sham” and the
9 “inconsistency between a party’s deposition testimony and subsequent affidavit must be
10 clear and unambiguous to justify striking the affidavit.” Yeager v. Bowlin, 693 F.3d
11 1076, 1080 (9th Cir. 2012) (citation omitted).

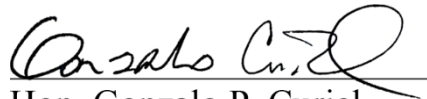
12 Since the Court is ruling on a motion for class certification, the sham affidavit rule
13 is not applicable. Nonetheless, the Court may consider inadmissible evidence on class
14 certification. Accordingly, the Court overrules Defendant’s evidentiary objections.

15 Conclusion

16 Based on the reasoning above, the Court DENIES Plaintiff Victorino’s amended
17 motion for class certification. The Court also DENIES Plaintiff Tavitian’s amended
18 motion for class certification as moot.

19 IT IS SO ORDERED.

20 Dated: June 13, 2018

21 
22 Hon. Gonzalo P. Curiel
23 United States District Judge
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